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No. 86-714

In the Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY P. WESTFALL, ET AL., PETITIONERS

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Page

Cases:

Barr v. *Matteo*, 360 U.S. 564 (1959) 4

Davis v. *Scherer*, 468 U.S. 183 (1984) 3

Poolman v. *Nelson*, 802 F.2d 304 (8th Cir. 1986) 1, 2

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1. Respondents' principal argument against certiorari is that there is no conflict among the courts of appeals regarding the scope of federal employees' immunity from liability under state tort law for injuries caused by their official acts.[1] Respondents are clearly wrong.

First, the Eighth Circuit in *Poolman* v. *Nelson*, 802 F.2d 304 (1986), concluded that federal employees are immune from state tort law liability as long as they act within the scope of their official duties, expressly rejecting the view of

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[1]We address here the arguments opposing certiorari advanced by respondents in the present case and the respondents in two pending cases that present the identical question. See *Deschambault* v. *Sowell*, petition for cert. pending, No. 86-833; *Potts* v. *Heathcoat*, petition for cert. pending, No. 86-862. We suggested in the petitions in *Deschambault* and *Potts* that the Court hold those cases pending its disposition of the petition in the present case.

several other courts of appeals (see Pet. 6-9) that immunity is available only to employees who exercise a measure of discretion. The court in *Poolman* observed that it previously had "found federal officials subject to personal liability for tortious activity because their activity was not within the outer perimeter of their line of duty without expressly drawing the line between discretionary and ministerial activity" (802 F.2d at 307). Acknowledging that "some circuits have adopted the discretionary function requirement as an element in determining whether a federal official is immune from a common law tort cause of action," the court rejected such a "bright-line distinction[] between discretionary and ministerial acts" (*id.* at 308 (footnote omitted)). It concluded that a federal employee is entitled to immunity as long as he acts "within the outer perimeter of his scope of authority" and that the quantum of discretion exercised by the employee is relevant only insofar as it sheds light upon the scope of the official's authority (*id.* at 307-308).

There is no support for respondents' claim (86-714 Br. in Opp. 2; 86-862 Br. in Opp. 3) that the Eighth Circuit's decision in *Poolman* can be reconciled with the rule applied by the Eleventh Circuit in the present case because the government official named as the defendant in *Poolman* exercised policy making responsibility. The *Poolman* court never indicated that the defendant was a policy maker. Indeed, the court's description of the duties performed by the defendant as county supervisor for the Farmers Home Administration indicates that the court viewed the defendant as simply responsible for supervising the administration of the loan program in a particular geographic area (802 F.2d at 309 & n.4). Moreover, the conduct challenged by the plaintiffs in *Poolman*—alleged misrepresentations in the course of informing the plaintiffs of the status of their loan application—certainly cannot be characterized as a policy making activity.

Second, leaving *Poolman* aside, there is a conflict among the courts of appeals regarding the quantum of discretion that an employee must exercise in order to be entitled to immunity (see Pet. 6-9).[2] Respondents argue (86-714 Br. in Opp. 2-3; 86-862 Br. in Opp. 5-6 & n.3) that the decisions of the courts of appeals are distinguishable on their facts. But the courts of appeals plainly have announced different legal standards and, as we show in our petition, these standards can lead to irreconcilable results.

Third, respondents' assertion (86-714 Br. in Opp. 3) that it is not possible to adopt a definitive rule governing federal employees' immunity from state law tort liability demonstrates the serious defect in the manner in which the courts of appeals have defined the scope of official immunity in this context. The purpose of immunity is to eliminate the chill upon independent and vigorous government action that is likely to result from the fear of personal monetary liability. That purpose will be served only if federal employees can reasonably anticipate when their conduct may give rise to liability for damages (*Davis* v. *Scherer*, 468 U.S. 183, 195 (1984)). The standards adopted by the courts of appeals make the availability of immunity so uncertain that an official simply cannot know whether he will be protected from personal liability. As a result, the immunity rule cannot fulfill its purpose of ensuring the effective functioning of government.

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[2]The respondent in No. 86-833 acknowledges this conflict (Br. in Opp. 14), but asserts that review is not warranted in that case because the petitioners would not be entitled to immunity under any discretion-based standard. Whether or not that assertion is correct, in view of our argument that federal employees are entitled to immunity when they act within the scope of their official duties without regard to whether they exercise discretion, this Court should hold that case if it grants the petition here, and dispose of the case as appropriate in light of the disposition in *Westfall*.

2. Respondents also assert that review is not warranted because the decisions below are correct on the merits (86-714 Br. in Opp. 4-5; 86-833 Br. in Opp. 5-9, 11-13; 86-862 Br. in Opp. 7-8). The arguments raised by respondents are discussed in our petition (at 9-20), and the sharply conflicting positions of the parties about the meaning of *Barr* v. *Matteo*, 360 U.S. 564 (1959), and its progeny support the conclusion that this Court should grant the petition to consider the scope of federal employees' immunity in this context.

For the foregoing reasons, and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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